RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PETER ROBERT FLUX

Appeal 2007-0748
Application 09/890,771
Technology Center 3600

Oral Hearing Held: July 12, 2007

Before STUART LEVY, LINDA HORNER, and ANTON FETTING
Administrative Patent Judges

ON BEHALF OF THE APPELLANT:

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The above-entitled matter came on to be heard on July 12, 2007, at the United States Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Virginia Johnson, Court Reporter.

JUDGE LEVY: Mr. Kushman.

MR. KUSHMAN: Good afternoon. This appeal involves an invention for fall arrest of systems. These are systems that are used where they have a line that's suspended from a tower and a worker who claims that the tower is attached to the line and has a device to prevent the fall in case of an accident. The invention involves a tensioning mechanism that's used at the bottom of the line to tension the line that's there.

JUDGE FETTING: Excuse me, I'm just having a little trouble hearing.

MR. KUSHMAN: I'm sorry, is that better?

JUDGE FETTING: Yes.

MR. KUSHMAN: There is one reference that's still an issue and that is the David reference, which involves lines that are -- rubbing lines that are used in mined elevators. The fall arrest lines are usually 200 to 300 feet in length. These mine rubbing lines for these elevators are normally on the order of thousands of feet, sometimes up to a mile or so, and they're much -- rather than being lines that are a 1/4" in diameter, they're normally something on the order of 2 to 3 inches in diameter because they carry tons of weight rather than hundreds of thousands of pounds. I have to say one thing about my brief and the reply brief with respect to the David reference. Upon preparing for this appeal I had in there that the David reference has the device located at the top of the line, which is the way in which it's primarily taught. In fact, in the beginning of the reference they talk about the disadvantages of being located at the bottom of the line. However, as I was preparing I noted in the David reference, in the second page on the right column, just before the claims, that there is what I would call a boilerplate

statement that you could use it up or down. So, to the extent that my brief says that those -- that it's only located in the upper position in the David references, it's not correct. The argument that we have in this involves whether or not this is relevant prior art. And as we mentioned in the brief, in the reply brief, the difference in the uses, one being for fall equipment, to arrest a fall, and the other for guiding elevators, we call them, I guess they call them lifts in England where this patent was taken out. There are different uses.

JUDGE HORNER: Are you saying that if you use the tension device of David on a fall arrest system of your invention it wouldn't be capable of functioning tensionally?

MR. KUSHMAN: Well, it would -- I did some research on, you know, these analogous art and, you know, it would have a diameter to clamp a rope 3 or 4 inches in diameter as opposed to, you know, the 1/4". Now, if you size it, you know, I'm not saying that it couldn't function that way, I'm just, you know, I looked at the art in terms of analogous art, there is a case in the Deminski case in 1986, from the Federal Circuit, where they talk about the -- first you have to figure out whether there is, this is part of the inventor's field of endeavor. My position would be that it is not, when you're dealing with fall arrest equipment as opposed to guiding mined elevators. I think those are different arts. Next thing, even if it's not in the same endeavor, that case says that -- is it reasonably pertinent to the particular problem with which the inventor was involved. And the argument that I would put forth is that guiding an elevator is different, different in view of the diameter, the loads and the use involved, than a fall arrest equipment.

JUDGE HORNER: This is an anticipation rejection, in which case, non-analogous art really doesn't apply. If you look at the In re Schreiber case, it clearly states that, you know, you can have a reference from a different field and it'll still anticipate if it discloses the same structure. It has what's claimed, even if it's for internal use, it doesn't have to be the same use. I think that's what the examiner was relying on here, was that, that case law, to say that the structure of the David reference is the same, even though it's being used in a different environment.

MR. KUSHMAN: That's exactly what he's saying, and I looked at the cases and they go all different ways in terms of, you know, when you talk about analogous art, whether it's anticipation or just exactly what's involved, you know. What I'm saying is that if you look at something for winding a battleship anchor chain, is that the same analogous art to a fishing line? And my position, the reason I came down here is just to at least tell you verbally that I disagree. That's, basically, what our argument is.

JUDGE HORNER: Let me see if I have any questions. You argue, let me find it, I think it was at the conclusion of your initial brief --

MR. KUSHMAN: Um-Hum.

JUDGE HORNER: That's not it.

MR. KUSHMAN: The reply brief or the initial brief?

JUDGE HORNER: No, it was the initial brief, but it was in the conclusion section. You argued, on page 7, David lacks the disclosure of any bracket that's adapted to be fixedly mounted. Do you want to comment on that argument? It didn't appear in the rest of your -- in the discussion of David earlier in the discussion of the 102 rejection, but in the conclusion you mention it.

MR. KUSHMAN: Yeah, and then it goes on to say in a vertically oriented safety line. So, you know, I think that's what I'm saying there. And, also, there may have been some -- what I spoke about earlier, Judge, in terms of -- when I wrote this I had the David being located only at the upper end of the line, whereas as I mentioned earlier, I did -- in preparing for the appeal I noted that statement just before the claims in David and all that, it could be used either way.

JUDGE HORNER: Okay. I see. All right. Thank you.

JUDGE LEVY: Thank you.

MR. KUSHMAN: Thank you for your time. I appreciate it. Have a nice afternoon.

Whereupon, the proceedings concluded